IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 387/21

In the matter between:

MINISTER OF WATER AND SANITATION	First Applicant
DIRECTOR-GENERAL: DEPARTMENT OF WATER AND SANITATION	Second Applicant
BLITZKRAAL (PTY) LIMITED	Third Applicant

and

CASPER JACOBUS LÖTTER N.O.	First Respondent
JACOBUS ANDREAS DU PLESSIS N.O.	Second Respondent
JOHANNES CORNELIUS HEUNIS N.O.	Third Respondent

and in the matter between:

MINISTER OF WATER AND SANITATION	First Applicant
DIRECTOR-GENERAL: DEPARTMENT OF WATER AND SANITATION	Second Applicant

and

FRANCOIS GERHARDUS JOHANNES WIID	First Respondent
TORQHOFF BOERDERY (PTY) LIMITED	Second Respondent
FRANCOIS GERHARDUS JOHANNES WIID N.O.	Third Respondent
REINETTE JEPPE WIID N.O.	Fourth Respondent

CAREL JACOBUS VAN PLETZEN N.O. Fifth Respondent

GABRIEL PETRUS VILJOEN N.O. Sixth Respondent

ANTON ANDRÉ STRYDOM N.O. Seventh Respondent

ANTON STEPHANUS VILJOEN N.O. Eighth Respondent

and in the matter between:

MINISTER OF WATER AND SANITATION First Applicant

DIRECTOR-GENERAL: DEPARTMENT OF WATER AND SANITATION Second Applicant

SIFISO MKHIZE N.O. Third Applicant

DEPUTY DIRECTOR-GENERAL: WATER SECTOR REGULATION, DEPARTMENT OF WATER AND SANITATION Fourth Applicant

DEPUTY DIRECTOR-GENERAL: SPECIAL PROJECTS, DEPARTMENT OF WATER AND SANITATION Fifth Applicant

and

SOUTH AFRICAN ASSOCIATION FOR WATER USER ASSOCIATIONS First Respondent

EAGLE'S NEST INVESTMENT 3 CC Second Respondent

THUSANO EMPOWERMENT FARM (PTY) LIMITED Third Respondent

Neutral citation: *Minister of Water and Sanitation and Others v Lotter N.O. and Others; Minister of Water and Sanitation and Others v Wiid and Others; Minister of Water and Sanitation v South African Association for Water Users Associations* [2023] ZACC 09

Coram: Zondo CJ, Baqwa AJ, Kollapen J, Madlanga J, Majiedt J, Mathopo J, Mbatha AJ, Mhlantla J and Rogers J

Judgment: Madlanga J (unanimous)

Heard on: 23 August 2022

Decided on: 15 March 2023

ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Gauteng Division, Pretoria). The following order is made in each of the three applications:

1. Leave to appeal is granted.
2. The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

MADLANGA J (Zondo CJ, Baqwa AJ, Kollapen J, Majiedt J, Mathopo J, Mbatha AJ, Mhlantla J and Rogers J concurring):

Introduction

[1] This is an application for leave to appeal against a judgment of the Supreme Court of Appeal.[1] That Court set aside a judgment of the Gauteng Division of

[1] *Lötter N.O. v Minister of Water and Sanitation* [2021] ZASCA 159; 2022 (1) SA 392 (SCA).

the High Court, Pretoria.[2] The High Court judgment concerned three matters.[3] The application before us is about all those three matters. Before the High Court the matters raised the same central issue: the interpretation of section 25(1) and (2) of the National Water Act[4] (Water Act). That is what is at issue before us. More specifically, what we must determine is whether a water use entitlement obtained in terms of the Water Act may be "transferred"[5] to a third party and, if so, whether a fee may be charged for the transfer. To use the state applicants' terminology, the second part of the question is whether holders of water use entitlements may "trade" in the entitlements.[6]

Background

[2] Starting with the *Lötter N.O.* matter, the Doornkraal Business Trust (Doornkraal) owns farms in Somerset East in the Eastern Cape. It concluded an agreement with Britzkraal Properties (Pty) Ltd (Britzkraal) in terms of which it purchased 30 hectares of Britzkraal's water use entitlement for R1 950 000. In terms of section 25(2) of the Water Act, Britzkraal surrendered its water use entitlement. Doornkraal applied for a licence in terms of section 41 of the Act in respect of that water use entitlement. To this end, Doornkraal submitted a detailed motivation that dealt with each of the relevant considerations for the grant of a licence listed in section 27(1) of the Water Act. The Director-General of the Department of Water and Sanitation (Director-General), who is the responsible authority for purposes of section 41 applications and who is the second applicant in all the three matters before us, refused Doornkraal's application. Two of the reasons given for the refusal were that section 25(2) of the Water Act makes no provision for the transfer of a water use entitlement from one person to another and

[2] *South African Association for Water Users Associations v Minister of Water and Sanitation; Lötter N.O. v Minister of Water and Sanitation; Wiid v Minister of Water and Sanitation* [2020] ZAGPPHC 252.

[3] *South African Association for Water Users Associations v Minister of Water and Sanitation* (*SAAWUA* matter); *Lötter N.O. v Minister of Water and Sanitation* (*Lötter* matter); *Wiid v Minister of Water and Sanitation* (*Wiid* matter) [2020] ZAGPPHC 252.

[4] 36 of 1998.

[5] I use inverted commas because – as I explain later – strictly speaking, no transfers take place under section 25 of the Water Act.

[6] Here I use "trade" loosely, and I explain this later.

that the Water Act does not permit trading in water use entitlements.[7] Doornkraal, through its trustees, instituted proceedings in the High Court for the review and setting aside of the Director-General's decision and for a declarator on the meaning of section 25(2) of the Act.

[3] Coming to the *Wiid* matter, three agreements were concluded between Mr Wiid, Torqhoff Boerdery (Pty) Ltd and the trustees of the De Kalk Trust, on the one hand, and the GP Viljoen Trust, on the other. In the agreements, the GP Viljoen Trust undertook to surrender three water use entitlements in terms of section 25(2) of the Water Act to facilitate applications for licences to be made in terms of section 41 of the Water Act in respect of the three water use entitlements. In the *Wiid* agreement the contract price was R5 920 000. In the Torqhoff agreement the contract price was R15 413 333. And in the De Kalk Trust agreement it was R2 666 667. The purpose of the transfer was to enhance the combined crop farming operations of Mr Wiid, Torqhoff Boerdery and the De Kalk Trust in the Hopetown District of the Northern Cape. Mr Wiid, Torqhoff Boerdery and the De Kalk Trust applied for licences in terms of section 41 of the Water Act in respect of the three entitlements. For the same reasons given in the *Lötter* matter, the Director-General did not grant the licences. Mr Wiid, Torqhoff Boerdery and the De Kalk Trust (the latter, through its trustees) brought an application in the High Court seeking the same relief as that applied for in the *Lötter* matter.

[4] I next move on to the *SAAWUA* matter. The South African Association for Water User Associations (SAAWUA) is a voluntary association made up of a number of water user associations and irrigation boards. SAAWUA, Eagle's Nest Investments 3 CC

[7] The Director-General wrote:

> "Kindly note that section 25(2) of the National Water Act (Act 36 of 1998) does not make provision for the transfer of a water use entitlement from one person to another. A person who holds an entitlement may only surrender part or all of his/her entitlement to facilitate a water use licence application to use of water from the same resource in respect of other land that belongs to that person. The National Water Act therefore does not make provision for the trading or transferring of water use entitlements between two separate legal entities."

See Supreme Court of Appeal Judgment above n 1 at para 7.

(Eagle's Nest) and Thusano Empowerment Farm (Pty) Ltd (Thusano Empowerment) applied in the High Court for a declarator on the meaning of section 25(1) and (2) of the Water Act. In bringing suit, SAAWUA acted in its own interest, on behalf of its members and in the public interest. What triggered the litigation were refusals by the Director-General of applications for transfers of water use entitlements that Eagle's Nest and Thusano Empowerment had made.

[5] Interestingly, it is common cause that in about 1998 when publicising the Water Act, the Department of Water and Sanitation said – in so many words – that holders may trade in water use entitlements. It did not end there. During the period 1998 to 19 January 2018 the Department consistently allowed trading in water use entitlements. But on 19 January 2018 the Department issued a circular in which it said that section 25 does *not* allow trading in water use entitlements. This change of stance serves to explain what informed the Director-General's impugned decisions.

[6] The High Court dismissed all three applications. In the main, it held that on a proper reading of section 25 of the Water Act, trading in water use entitlements is not allowed as it is at variance with section 2 of the Act. Section 2 provides that the purpose of the Act is "to ensure that the nation's water resources are protected, used, developed, conserved, managed and controlled in ways which take into account amongst other factors . . . redressing the results of past racial and gender discrimination". On appeal to it, the Supreme Court of Appeal was split four-one. The minority agreed with the High Court's conclusion. The majority upheld the appeals. It held that section 25(1) and (2) of the Water Act does permit the temporary or permanent transfer of water use entitlements from a holder to a third party. The applications are now before us for leave to appeal. The actively participating applicants are the Minister of Water and Sanitation and other state functionaries.[8] I will simply refer to these state applicants as the applicants.

[8] The Minister of Water and Sanitation is the first applicant in all three applications. In both the *Lötter* and *Wiid* matters the state functionary who, in addition to the Minister, is also seeking leave is the Director-General: Department of Water and Sanitation. And in the *SAAWUA* matter the additional state

The applicants' submissions

[7] The applicants contend that the ordinary grammatical meaning of section 25(1) of the Water Act does not include the transfer of water use entitlements to a third party. Section 25(1) provides:

> "A water management institution may, at the request of a person authorised to use water for irrigation under the Act, allow that person on a temporary basis and on such conditions as the water management institution may determine, to use some or all of that water for a different purpose, or to allow the use of some or all of that water on another property in the same vicinity for the same or similar purpose."

[8] The applicants call that part of this section – which concerns allowing, on a temporary basis, "a person authorised to use water for irrigation under the Act" to use some or all of the water for a different purpose – "the first leg". I will call this part of the section "the first part", and the rest of the section "the second part". The applicants accept, correctly, that the first part concerns allowing water use *by the holder* for a different purpose on the same property in respect of which the authorisation was granted.

[9] What is in contention is the second part of section 25(1), i.e. allowing the use of some or all of the water on another property in the same vicinity for the same or similar purpose. The applicants take issue with the Supreme Court of Appeal's interpretation of this part. They contend that this part contemplates temporary use of water for the same or similar purpose on another property in the same vicinity by the holder, not a third party. They submit that this interpretation is informed by the fact that the section refers to use "on another property", and says nothing about such use being "by another

functionaries who are also applying for leave to appeal are the Director-General: Department of Water and Sanitation; the Deputy Director-General: Water Sector Regulation, Department of Water and Sanitation; and the Deputy Director-General: Special Projects, Department of Water and Sanitation. In two of the matters there are private parties, Blitzkraal (Pty) Ltd in one, and Sifiso Mkhize N.O. in the other. I do not consider it necessary to itemise all the many respondents in each of these three matters. It is enough that I have identified each matter by the first respondent (i.e. *Lötter*, *Wiid* and *SAAWUA*).

person or third party". They also argue that "transfer of water use authorisations" in the heading under which section 25 falls means no more than the transfer of a water authorisation from one property to another, "and not from an authorised water user to a third party". The applicants contend that their interpretation is in harmony with the rest of the provisions of the Water Act.

[10] I set out the applicants' submissions on the question whether section 25(1) does allow the charging of a fee shortly.

[11] Coming to section 25(2) of the Act, this section provides:

> "A person holding an entitlement to use water from a water resource in respect of any land may surrender that entitlement or part of that entitlement—
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> (a) in order to facilitate a particular licence application under section 41 for the use of water from the same resource in respect of other land; and
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> (b) on condition that the surrender only becomes effective if and when such application is granted."

[12] The applicants argue that this section is meant to facilitate a licence application in terms of section 41 of the Water Act by the holder, not a third party. According to the applicants, section 25(2) finds application where the holder wants to use water on a property other than the property to which the entitlement attaches. So, under this section as well, a third party does not feature.

[13] On the question whether the Water Act allows the charging of a fee in respect of transactions concluded in connection with water use entitlements, the applicants' answer is in the negative. As I indicated earlier, until 19 January 2018 the Department of Water and Sanitation allowed trading in water use entitlements. That is, holders of water use entitlements could surrender their entitlements to facilitate a section 41 application or allow use of the entitlements by third parties, and do both at a fee. The question whether a fee is chargeable in terms of the Water Act arises when a

holder: allows water use by a third party in terms of the second part of section 25(1);[9] or surrenders a water use entitlement in order to facilitate an application for a licence by a third party under section 41 as envisaged in section 25(2).[10]

[14] The applicants submit that very wealthy farmers, who are largely white, have created an enclave within which a scarce national natural resource is traded, thus perpetuating the imbalances of the past. This infringes the right to equality. As a consequence, continues the submission, an interpretation of section 25(1) and (2) that sanctions trading in water use is contraindicated. And this interpretation is at odds with section 2(c) of the Water Act. That is so because this section stipulates that the purpose of the Water Act is, among others, to redress the results of past racial and gender discrimination. The applicants also highlight the fact that the predecessor to the Water Act, the 1956 Water Act,[11] made specific provision for trading in water use. They argue that the Water Act makes no similar provision and that this is an indication that the Legislature has since set its face against trading in water use.

[15] The applicants also argue that interpretatively it does not make sense that – having paid paltry administrative fees on applying for their entitlements – holders should enjoy the right to trade in the entitlements at amounts as huge as the sums we have seen in this matter.[12]

Jurisdiction

[16] The applicants' pleaded case raises constitutional issues. They argue that, by allowing the wealthy "to sell water", a scarce natural resource held in trust by the Minister, the Supreme Court of Appeal's judgment infringes sections 9 (right to equality) and 27 (right of access to water) of the Constitution. They also submit that

[9] That, of course, is if section 25(1) allows the interposition of a third party.

[10] That is if, contrary to the applicants' submissions, the surrender may be in favour of a third party.

[11] 54 of 1956.

[12] The amounts involved in this matter range from R1 950 000 to R15 413 333. And we have no idea what is happening in the rest of the market.

the interpretation of legislation must be "seen and utilised as a platform for the promotion of the Bill of Rights by infusing [the Bill of Rights'] central purpose into the very essence of the legislation itself".[13] For this submission, they implicitly invoke section 39(2) of the Constitution and rely on this Court's judgment in *Independent Institute of Education*. I say they implicitly rely on section 39(2) of the Constitution because at the centre of the passage they rely on in *Independent Institute of Education* is section 39(2). This Court's constitutional jurisdiction is engaged.

[17] Additionally, the applicants call in aid section 167(3)(b)(ii) of the Constitution, arguing that our general jurisdiction is also engaged. It is definitely so that the issues identified above, which are raised by the applicants' pleaded case, raise points of law. As the discussion that follows will show, the points are arguable. They most definitely are of general public importance. And they ought to be considered by this Court. Thus, the matter also engages our general jurisdiction.

Leave to appeal

[18] Some of the applicants' arguments do exercise one's mind. I cannot dismiss them as lacking reasonable prospects of success. Also, as I say in connection with our general jurisdiction, the arguments raise questions of great import to the general public. Leave to appeal must be granted.

Does section 25(1) permit the use of water by a person other than the holder of a water use entitlement?

[19] In *Cool Ideas* Majiedt AJ held that words of a statute "must be given their ordinary grammatical meaning, unless to do so would result in an absurdity".[14] Three riders to this are that: the provisions must be interpreted purposively; the provisions

[13] *Independent Institute of Education (Pty) Limited v KwaZulu-Natal Law Society* [2019] ZACC 47; 2020 (2) SA 325 (CC); 2020 (4) BCLR 495 (CC) at para 2.

[14] *Cool Ideas 1186 CC v Hubbard* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) at para 28. See also *Chisuse v Director-General, Department of Home Affairs* [2020] ZACC 20; 2020 (6) SA 14 (CC); 2020 (10) BCLR 1173 (CC) at para 47.

must be contextualised; and statutes must, as far as is reasonably possible, be interpreted in conformity with the Constitution.[15]

[20] Plainly, the first and second parts of section 25(1) of the Water Act are two things that may be allowed by a water management institution. For the reasons stated above, I need say nothing more about the first part. Read with the words that introduce both parts, here is how the second part of section 25(1) reads:

> "A water management institution may, at the request of a person authorised to use water for irrigation under [the Water] Act, allow that person on a temporary basis and on such conditions as the water management institution may determine . . . to allow the use of some or all of that water on another property in the same vicinity for the same or similar purpose."

[21] The applicants' interpretation means that the water management institution may allow the holder to allow her- or himself to use some or all of the water on another property in the same vicinity for the same or similar purpose. Grammatically, that does not make sense: the holder allowing her- or himself to use the water on another property temporarily. What makes sense is that the section means the water management institution may allow the holder to allow use of some or all of the water on another property by another person, i.e. a third person.

[22] To put it differently, one of the forms of authority which may be given in terms of section 25(1) is that the water management institution may authorise ("allow") the holder of the water use entitlement to allow the use of some of the water on another property. Although the authority (the first "allowance") is given by the institution, it is the holder of the water use entitlement who then allows (the second "allowance") the use of the water on another property. The second "allow" (in the phrase "to allow the use of") most naturally refers to the situation where the holder of the entitlement allows someone else to use the water on nearby land. One would not ordinarily say that the

[15] *Cool Ideas* Id.

holder of a right allows her- or himself to use the water elsewhere. Of course, if the question were to be asked whether the section precludes the use of the water by the entitlement holder on another property, the answer seems to be that it does not. That is because it seems absurd to permit use of the water on neighbouring property by a third party but not use on neighbouring property by the holder her- or himself.

[23] If the interpretation contended for by the applicants had been intended, it could simply have been rendered thus:

> "A water management institution may, at the request of a person authorised to use water for irrigation under [the Water] Act, allow that person, on a temporary basis and on such conditions as the water management institution may determine, to use some or all of that water for a different purpose on the same property or on another property in the same vicinity for the same or similar purpose."

[24] In sum, section 25(1) is incapable of the interpretation contended for by the applicants.

[25] When the grammatical difficulty arising from the applicants' interpretation was raised during oral argument, the applicants' counsel countered by arguing that water use is permissible only if it is sanctioned by section 22(1) of the Water Act. In terms of section 22(1)(a) water use without a licence is permissible only if: that water use is permissible under Schedule 1 to the Water Act (section 22(1)(a)(i));[16] that water use is permissible as a continuation of an existing lawful use (section 22(1)(a)(ii));[17] or that

[16] This Schedule, headed *Permissible Use of Water*, provides for reasonable domestic water use in a person's household directly from a resource to which the person has lawful access, use of water, on land owned by a person, from a resource situated on the land or forms a boundary of that land, for small non-commercial gardening and for watering animals which graze on that land, storage and use of run-off water from a roof, for the taking of water, in emergency situations, from any resource for human consumption or firefighting, for the use and portage of water for recreational purposes, and the discharge of waste water or water containing waste or run-off into stipulated conduits like canals, sea outfall, etc.

[17] In terms of section 32(1) an "existing lawful water use" means a water use—

> "(a) which has taken place at any time during a period of two years immediately before the date of commencement of this Act and which—

water use is permissible in terms of a general authorisation issued under section 39 (section 22(1)(a)(iii)).[18] In addition, a person may only use water if the water use is authorised by a licence under the Water Act (section 22(1)(b)) or if the responsible authority has dispensed with a licence requirement under section 22(3) (section 22(1)(c)).[19] The applicants submitted that the interpretation offered in paragraphs 20-24 gives rise to use of water that is precluded by section 22(1). Put differently, such use does not fall under what is itemised in the section and is thus legally impermissible.

[26] Surely, despite its apparently categorical language, section 22(1) does not tell the full story on permissible water use. Water use resulting from an authorisation by a water management institution in terms of section 25(1) is manifestly water use that does not fall under any of the categories itemised in section 22(1). If the applicants' argument were correct, it would mean that water use in terms of section 25(1) (whether under the first or second part of the section) is impermissible under section 22(1). One need only say this to show that the applicants' argument is flawed. The water use resulting from section 25(1) authorisations does not: fall under the categories contained in section 22(1)(a); is not authorised by a licence as envisaged in section 22(1)(b); and does not result from the responsible authority having dispensed with a licence requirement under section 22(3) as envisaged in section 22(1)(c). That notwithstanding, section 25(1) does provide for such use in so many words. If the applicants' argument were correct, a line would have to be drawn through the entire section 25(1), because

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(i) which was authorised by or under any law which was in force immediately before the date of commencement of this Act;

(ii) is a stream flow reduction activity contemplated in section 36(1); or

(iii) is a controlled activity contemplated in section 37(1); or

(b) which has been declared an existing lawful water use under section 33."

[18] Section 39(1) provides that a responsible water authority may, subject to Schedule 1, by notice in the *Gazette*, generally, in relation to a specific water resource, or within an area specified in the notice, authorise all or any category of persons to use water.

[19] Section 22(3) provides that "[a] responsible authority may dispense with the requirement for a licence for water use if it is satisfied that the purpose of this Act will be met by the grant of a licence, permit or other authorisation under any law".

there would be no room for the authorisations outside of the terms of the licence envisaged in section 22. Of course, that would be absurd in the extreme.[20]

[27] Section 26(1)(*l*) provides that the Minister may make regulations "relating to *transactions* in respect of authorisations to use water". The regulations may include "the circumstances under which a *transaction* may be permitted", "the conditions subject to which a *transaction* may take place" and "the procedure to deal with a *transaction*".[21] I understand a "transaction" to involve more than one person.[22] The applicants did not proffer a cogent argument as to why the second part of section 25(1) may not involve a transaction in this sense.

[28] In conclusion, section 22(1) must be read harmoniously with section 25(1). The result is that section 25(1) does provide for water use not itemised in section 22(1). Thus, the meaning of section 25(1) rendered in paragraphs 20-24 is not only perfectly acceptable, but is the most apt. That is, the section does permit the introduction of a third party to enjoy water use in respect of an entitlement held by another person.

Is the licence application envisaged in section 25(2) a licence application by the holder of a water use entitlement?

[29] According to the applicants, in section 25(2) as well there is no express mention of a third party. That is true, but one could equally say that the section does not expressly exclude a third party. To recapitulate, the applicants argue that the section is meant to facilitate a licence application in terms of section 41 of the Water Act by the holder of the water use entitlement, not a third party. The applicants' interpretation of section 25(2) requires that the square-bracketed words in the quotation that follows be inserted into the section:

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[20] As indicated above, an interpretation that leads to an absurdity must be avoided. See *Cool Ideas* above n 14.

[21] My emphasis. All this is to be found in section 26(1)(*l*)(i)-(iii).

[22] This is supported by dictionary meanings of "transaction". The Oxford English Dictionary defines "transaction" as "a piece of business that is done between people, especially an act of buying or selling". The Cambridge English Dictionary defines "transaction" as "an occasion when someone buys or sells something, or when money is exchanged or the activity of buying or selling something".

> "A person holding an entitlement to use water from a water resource in respect of any land may surrender that entitlement or part of that entitlement—
>
> (a) in order to facilitate a particular licence application under section 41 for the use of water from the same resource in respect of other land [by the person holding the entitlement to use water]."

[30] This insertion entails a limiting qualifier to the otherwise plainly broad language of the section. The breadth of the language of section 25(2) is magnified by the breadth of the language of section 41 in terms of which an application for a licence may basically be made by anybody. Of course, the fate of each application will depend on its merits. I can think of no interpretative tool that justifies this departure from the plain language of the section and dictates the insertion suggested by the applicants' interpretation. Our courts – including this Court – have consistently held that words cannot be read into a statute by implication unless the implication is necessary in the sense that without it effect cannot be given to the statute as it stands and that without the implication the ostensible object of the legislation cannot be realised.[23] In this instance, nothing makes the implication necessary. Thus, the application for a licence envisaged in section 25(2) may be made by a third party.

Does the Water Act prohibit the charging of a fee in respect of transactions concluded in connection with water use entitlements?

[31] The Water Act has no provision which expressly prohibits "trading" in water use entitlements between private individuals.[24] Section 29(2), which pertains to conditions which may be imposed by the responsible authority when issuing water use licences under the Water Act, reads:

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[23] See *Rennie N.O. v Gordon* 1988 (1) SA 1 (A) at 22E-H and *Masethla v President of the Republic of South Africa* [2007] ZACC 20; 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 (CC) at para 192.

[24] I use trading in water use entitlements loosely. I must say I am not sure that a water use entitlement is a right that is capable of being sold in the legal sense. On the face of it, this right cannot be "sold". In terms of section 25(2) the holder can at best surrender her or his right in order to facilitate a particular application by another person. When X surrenders her or his water use right, and a water use right from the same resource is then granted to Y in terms of section 41, X's right is extinguished and a new right in favour of Y comes into existence. So, there is no transfer or sale of the right in the strict legal sense.

> "If a licensee has agreed to pay compensation to another in terms *of any arrangement* to use water, the responsible authority may make the obligation to pay compensation a condition of the licence." (Emphasis added.)

[32] Section 29(2) appears to acknowledge that it is lawful in terms of the Water Act to enter into a private transaction relating to the use of water with another person and that, when this is done, it is in order for such an arrangement to include the payment of compensation. Additionally, section 29(2) permits a licensee's obligation to pay compensation to be made a condition of the licence. This is consonant with an interpretation that a surrender under section 25(2) may be subject to a condition that, upon the success of a licence application by a third party (the new licensee), the latter will be liable to pay a fee to the erstwhile licensee.

[33] This interpretation and the provisions of sections 26(1)(*l*) and 29(2), which are, respectively, about "transactions" and "compensation", were put to the applicants' counsel at the hearing. The response was that section 25 must not be read conjunctively with sections 26(1)(*l*) and 29(2). The reason given for this submission was that section 25 was in that part of the Water Act that is substantive or norm-setting, whereas sections 26(1)(*l*) and 29(2) are in that part of the Act that concerns procedural matters. This submission is problematic for at least two reasons. First, I am not aware of a rule of interpretation that says different parts of a statute dealing with different subject matter must be compartmentalised such that each can never bear relevance to the interpretation of the other. Second, courts must interpret legislation contextually.[25] And "context" includes other provisions of the statute or the statute as a whole. In *Hoban* Howie JA held that an interpretative approach that says "context" "is confined to parts of a legislative provision which immediately precede and follow the particular passage under examination" is unacceptably narrow.[26] He continued by saying that "'[c]ontext'

[25] See *Cool Ideas* above n 14.

[26] *Hoban v ABSA Bank Ltd t/a United Bank* [1999] ZASCA 12; 1999 (2) SA 1036 (SCA) at para 20. See also *Association of Mineworkers and Construction Union v Chamber of Mines of South Africa* [2017] ZACC 3; 2017

includes the entire enactment".[27] So, I cannot agree that sections 26(1)(*l*) and 29(2) must play no role in the interpretation of section 25.

[34] Even if procedural, sections 26(1)(*l*) and 29(2) do refer to "transactions" and "compensation". From that, it is plain that money may change hands. In line with the rule of interpretation expressed through the maxim *ut res magis valeat quam pereat,*[28] those concepts must be given meaning. What then is that meaning? And what do the transactions relate to? Section 25 is most certainly the substantive enactment contemplated in the procedural provisions of sections 26(1)(*l*) and 29(2).

[35] I next deal with the applicants' point about a paltry administrative fee versus huge fees payable for trading in water use entitlements. I do not think the fact that the holder of the entitlement pays a small administrative fee is a relevant consideration. The reality is that a farm with water use rights is worth more than the same farm without water use rights. Because holders can trade in water use entitlements without selling the farms themselves, market forces dictate what the fees must be. And there is no logical reason why there must be a connection between those fees and the small administrative fee payable at the time of applying for a licence.

[36] In addition, in the absence of a clear enough proscription of trading in water use entitlements (which there is not), private persons must surely be perfectly entitled so to trade. There is a marked difference between legal constraints on private persons and organs of state. The English case of *Somerset County Council* held:

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(3) SA 242 (CC); 2017 (6) BCLR 700 (CC) at para 32 and *Liesching v S* [2016] ZACC 41; 2017 (2) SACR 193 (CC); 2017 (4) BCLR 454 (CC) at para 34.

[27] *Hoban* id.

[28] I would loosely translate this maxim to mean it is better to give effect to something than to render it nugatory. See *AmaBhungane Centre for Investigative Journalism NPC v Minister of Justice and Correctional Services;* [2021] ZACC 3; 2021 (3) SA 246 (CC); 2021 (4) BCLR 349 (CC) at para 77 and *Cabinet for the Territory of South West Africa v Chikane* [1988] ZASCA 92; 1989 (1) SA 349 (A) at 371. This sensible presumption also applies to the interpretation of contracts. See, for example, *Welch Estate v Commissioner, South African Revenue Service* [2004] ZASCA 40; 2005 (4) SA 173 (SCA) at para 59.

> "Public bodies and private persons are both subject to the rule of law; nothing could be more elementary. But the principles which govern their relationships with the law are wholly different. For private persons, the rule is that you may do anything you choose which the law does not prohibit. It means that the freedoms of private citizens are not conditional upon some distinct and affirmative justification for which he must burrow in the law books. Such a notion would be anathema to our English legal traditions. But for public bodies the rule is opposite, and so of another character altogether. It is that any action to be taken must be justified by positive law."[29]

[37] In sum, I see no impediment to a fee being charged for water use under the second part of section 25(1) or in respect of a surrender of a water use entitlement in terms of section 25(2) in order to facilitate a section 41 licence application by a third party.

Remedy

[38] For these reasons, the appeal falls to be dismissed with costs, including costs of two counsel.

Epilogue to analysis

[39] The conclusion that I have reached is not dismissive of the state's concerns that water, a scarce national resource, is largely in the hands of advantaged white farmers. On the contrary, I understand why the state may now be seeking to redress the injustice brought about by this disproportionate enjoyment of water use entitlements. Indeed, one of the factors to be considered to ensure the achievement of the purpose of the Water Act is "redressing the results of past racial and gender discrimination".[30] This attests to the reality of the racially skewed enjoyment of water use entitlements. Unfortunately, the existing legislative instrument does not admit of the redress; at least not in the manner contended for by the applicants in this matter.

[29] *R v Somerset County Council, Ex parte Fewings* [1995] 1 All ER 513 (QB) at 524E-G cited with approval in *Clur v Keil* 2012 (3) SA 50 (ECG) at para 15.

[30] Section 2(c) of the Water Act.

Order

[40] The following order is made in each of the three applications:

1. Leave to appeal is granted.
2. The appeal is dismissed with costs, including the costs of two counsel.

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